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The European Economic Community's Council Directive on Product Liability

On June 25, 1985, the Council of the European Economic Community (EEC or Community) issued a Council Directive on the approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products.[1] The objectives of the Directive are to harmonize the legal environment in the EEC with regard to product liability by abolishing existing differences between the national laws of the member states, thus providing for more competitive equality, and to provide for increased consumer protection against the risks inherent in modern technological production. In order to achieve these aims, the concept of liability without fault was introduced.[2] Apart from a few statutory exceptions,[3] this concept has hitherto been alien to the national laws of the member states.

The concept of non-fault product liability was first adopted by the Commission Recommendation of 1976.[4] The Commission Recommendation was then submitted to the European Parliament[5] and the Economic and Social Committee[6]—both organizations suggesting changes—and in 1979 a revised Commission Recommendation was sent to the European Council

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1. 28 O.J. EUR. COMM. (No. L 210/29) 29 (1985) [hereinafter cited as *Council Directive*].
2. *Id.* at art. 1.
3. *See infra* text accompanying notes 10-21.
4. O.J. No. C 241 9, 14.10.1976, p. 9.
5. *Resolution of the European Parliament*, 22 O.J. EUR. COMM. (No. C 127/61), p. 61 (1979).
6. *Opinion of the Economic and Social Committee*, 22 O.J. EUR. COMM. (No. C 114/15) 15 (1979).

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for approval.[7] After controversial discussions and various deadlocks during the following years, it became doubtful whether the European Council would pass the Directive. The present Directive, which constitutes a compromise among the diverging interests of the various member states, was finally adopted during the Italian Presidency.

Notwithstanding its broad scope, the Directive does not create any direct rights of parties injured by defective products, but instead obliges the member states to implement the Directive by adopting laws, regulations and administrative provisions in compliance with the Directive not later than three years from the date of the Directive, i.e., by June 30, 1988. According to art. 189 of the Treaty of Rome establishing the EEC,[8] a directive is binding upon each member state. Only when a member state fails to adopt implementing legislation within the time period set forth in the directive will the provisions of the directive, to the extent that they are unconditional and sufficiently precise,[9] be given direct effect.

I. Concept of Non-Fault Liability

In conformity with the Commission Recommendation,[10] art. 1 of the Council Directive provides for strict liability without regard to whether the producer can be charged with negligence.[11] The damaged party must demonstrate only that the product was defective and that the defect caused the injury. Apart from some statutory exceptions, this concept is unknown in the member states, where the additional requirement of negligence on the part of the producer is the rule.[12] The producer is negligent when he violates his duty of care with regard to the injured party. While the injured party is generally required to prove in a tort action that the defendant's action caused the damages and that the defendant was at fault, judicial opinions in some member states have shifted the burden of proof on the fault issue to the producer on the basis that the producer is much closer to his production process and that possible defects in the product are within his sphere of risk.[13]

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7. *Commission Recommendation*, 22 O.J. EUR. COMM. (No. C 271/3) 3 (1979) (hereinafter cited as *Commission Recommendation*).

8. Treaty Establishing the European Economic Community, done at Rome, March 25, 1957, 298 U.N.T.S. 4. The official English text is found at 2 Common Mkt. Rep. (CCH) ¶ 3815. It is also published in *Treaties Establishing the European Communities* (Office for Official Publications of the European Communities, 1979).

9. Toepke, *E.C. Sets Standards on Product Liability*, EUROPE, Nov.-Dec. 1985, p. 20.

10. *Commission Recommendation*, *supra* note 7.

11. *Council Directive*, *supra* note 1, art. 1.

12. *See* Hollmann, *Die EG-Produkthaftungsrichtlinien*, in 1985 DER BETRIEB 2389 *et seq.* & 2439 *et seq.*

13. *See* Schwarz, Sabagh, Peltzer & Schuecking, *Produzentenhaftung in den USA und in Deutschland—Product Liability in the U.S.A. and in Germany* 66 (English-German publication, GERMAN-AMERICAN CHAMBER OF COMMERCE 1985).

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In the Federal Republic of Germany, this shift in the burden of proof goes back to the famous 1968 *Huehnerpest* (poultry disease) decision[14] by the German Federal Supreme Court, which has been followed by German courts ever since. The manufacturer is free of any liability when he succeeds in exonerating himself. This was, for instance, the case in the significant *Haspel* (winch) decision,[15] where a winch broke and the mine cage plunged to the bottom of the mine shaft causing miners to lose their lives. The manufacturer of the winch was able to escape liability by proving that the break was attributable to the inferior quality of the steel used in his winch, that he had not been able to recognize this fact and that he did not have reason to suspect that the otherwise dependable steel producer would supply a bad product.

As a rare exception to the rule that a defendant in a tort action is only liable for fault, there are some special laws providing for strict liability in tort. In the Federal Republic of Germany, the most important are: section 84 of the Pharmaceutical Products Act,[16] under which the manufacturer of pharmaceutical products is liable even without fault for damages caused by his products (the manufacturer's liability is limited to 200 million German marks per product and 500.000 marks for each incident); the Atomic Energy Act,[17] providing for liability resulting from thermonuclear fission and radiation; section 22 of the Water Resources Management Act,[18] providing for liability for damage caused by the emission of substances into waters; and section 7 of the Road Traffic Act,[19] providing that the owner of a motor vehicle is liable for damages resulting from the operation of his vehicle except when the accident is unavoidable.

Similarly in France, Belgium and Luxemburg, the owner (*gardien*) of an object is responsible for damages resulting from the use of that object,[20] except in the case of an act of God (force majeur). In Spain, a new Consumer Protection Act enacted in 1984 also provides for non-fault liability with regard to those products where strict regulations exist, such as food, pharmaceuticals, cosmetics, electrical appliances, vehicles, etc.[21]

14. German Federal Supreme Court Gazette 51, p. 91.

15. German Federal Supreme Court decision of February 16, 1972, in *Versicherungsrecht* p. 559 (1972).

16. Pharmaceutical Products Act of August 24, 1976, Federal Gazette 1976 I, p. 2445 as amended on February 24, 1983, Federal Gazette 1983 I, p. 169.

17. Atomic Energy Act of October 31, 1976, Federal Gazette 1976 I, p. 3053, as amended on July 15, 1985, Federal Gazette 1985 I, p. 1565.

18. Water Resources Management Act of October 16, 1976, Federal Gazette 1976 II, p. 3017.

19. Road Traffic Act of December 19, 1952, Federal Gazette 1952 I, p. 837.

20. *See* Hollmann, *supra* note 12, at 2390.

21. Ley 19 Julio 1984, num 26.84 Consumo General para la defensa de los consumidores y usuarios, Aranzadi, Repertorio Cronologico de Legislacion, 1984 volumen II, primera edicion.

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Since this act must be implemented by regulations, no concrete experiences are available so far.

II. Parties against Whom Claims May Be Asserted

The second most significant feature of the new Council Directive is the expansion of the scope of the parties against whom claims may be asserted.[22] Art. 3(1) of the Directive sets forth that the manufacturer of a finished product, as well as the supplier of any raw material or component part, is to be deemed a "producer." This is in conformity with most European laws. Under German law, for instance, the producer of the finished product and the producers of defective raw materials and component parts are jointly and severally liable.[23] However, the producer of the finished product can exonerate himself by showing that he had reasonably investigated the suppliers and found them to be reliable and trustworthy. The manufacturer is not required to conduct a costly physical and technical inspection of the supplied parts.

In contrast to most European laws, the Council Directive additionally provides for liability of "quasi-producers," i.e., parties who by putting their names, trade marks or other distinguishing features on the product hold themselves out to be producers. While this inclusion of "quasi-producers" is not altogether alien to the United States concept, German courts have so far predominantly held that a party who, albeit under his own trade name, only markets a product manufactured by someone else, is not deemed a manufacturer for purposes of product liability;[24] he is thus not subject to the principles of product liability unless he had knowledge of previous accidents or of circumstances suggesting that close inspection was required.

Parties who import commodities into the Community for sale, hire, lease or any form of distribution in the course of business may also be made parties to a product liability suit even though not holding themselves out as producers.[25] The reasoning behind this is that there should be at least one party within the Community who may be held liable. Where the producer of the product cannot be identified, a product liability claim may also be asserted against each supplier of the defective product unless he reveals the producer or his own supplier,[26] the rationale being to protect consumers against "anonymous" products. By contrast, the various wholesale and retail sales levels are not subject to product liability under

22. *Council Directive*, *supra* note 1, at art. 3(1).
23. Schwarz, Sabagh, Peltzer & Schuecking, *supra* note 13, at 52.
24. German Federal Supreme Court, in: *Neue Juristische Wochenschrift* 1980, p. 1219.
25. *Council Directive*, *supra* note 1, at art. 3(2).
26. *Id.* at art. 3(3).

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German law,[27] except for possible claims of buyers under the theory of breach of express or implied warranties. These contractual claims, however, can only be asserted where privity of contract exists and thus usually do not apply between the injured consumer and the producer.

The Council Directive provides that multiple defendants share joint and several liability.[28] The Directive does not address the issues of contributory negligence or recourse between the defendants. Since these issues are decided by the provisions of national laws, which differ, some divergence of outcomes in similar cases is to be expected.

III. Product Defects

The definition of product defects is based on customer expectations. The product is defective[29] when it does not provide the safety which a person is entitled to expect, taking into account the presentation of the product,[30] its reasonably expected use,[31] and the time when the product is put into circulation.[32] Criticism has been voiced that this definition creates a subjective rather than an objective standard and also that there is ambiguity concerning whether the definition refers to the expectations of a particular person who had suffered injury or to the expectations of a typical and reasonable consumer.[33] Although the wording of the Directive might be construed in the former way, I believe that it is clear that the standard of the public in general, i.e., a reasonable consumer, is decisive.

There is also doubt as to what point in time is decisive concerning the consumer expectations. Is it the time when the product was put into circulation or the time of the court decision? This question raises the problem of whether a product is deemed to be defective even where the defect was unforeseeable based on the state of scientific and technical knowledge at the time when it was put into circulation. Considering the sweeping scope of the wording of art. 6(1) and taking into account that art. 7(e) expressly provides a "state of the art" defense for producers, I

27. Schwarz, Sabaghi, Peltzer & Schuecking, *supra* note 13, at 53.
28. *Council Directive*, *supra* note 1, at art. 5.
29. *Id.* at arts. 6. Concerning the definition of product defects, *see* Blenk, *Zum Fehlerbegriff im Richtlinienvorschlag "Produkthaftung" der EG-Kommission*, in 1978 DER BETRIEB 1725; von Huelsen, *Ist die von der EG-Kommission vorgeschlagene Form der Produzentenhaftung eine gute Loesung*, in 1977 RECHT DER INTERNATIONALEN WIRTSCHAFT 373; Landfermann, *Der geaenderte Richtlinienvorschlag der EG-Kommission zur Produkthaftung*, in 1980 RECHT DER INTERNATIONALEN WIRTSCHAFT 161.
30. *Council Directive*, *supra* note 1, at art. 6(1)(a).
31. *Id.* at art. 6(1)(b).
32. *Id.* at art. 6(1)(c).
33. Hollmann, *supra* note 12, at 2392.

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believe that courts will interpret the consumer expectations ex post facto at the time of the court decision and interpret "defects" in the broad sense used by United States courts under the theory of strict liability.[34]

As far as the use of the product is concerned, the Directive's wording provides that "the use to which it could reasonably be expected that the product would be put" is decisive.[35] This wording constitutes a change from the revised Commission Recommendation which provided that a product was defective when, "being used for the purpose for which it is apparently intended," it fails to meet the consumer's reasonable expectations.[36] Under the Council Directive, the producer cannot rely on the consumer's using his products only for a proper purpose, but must take a certain degree of misuse into account unless this misuse deviates too much from reasonably foreseeable consumer behavior. The bounds of reasonable behavior are not strictly defined. This means in effect that producers have to take precautions against possible misuse and also give adequate warnings that particular forms of misuse could result in injury to the consumer.

IV. Defenses to the Claim

While the Directive leaves the issues of contributory negligence and assumption of risk to the national laws of the member states,[37] it expressly provides in art. 7 for special defenses on which the producer must bear the burden of proof. The first such defense refers to the situation where the producer did not put the product into circulation.[38] A second form of defense is proof that the defect which caused the damage probably did not exist at the time when the product was put into circulation or that the defect came into being later.[39] The key word here is "probably." Under the laws in most European countries, the injured party must show that the defect existed at the time the product was put into circulation.[40] Although the courts have partially relaxed this burden of proof, the Council Directive works to the producer's disadvantage[41] because this proof might be difficult, especially where the defect is discovered many years after production. Although the producer must show only a probability,

34. *See* von Huelsen, *Produkthaftpflicht U.S.A. 1978 '79—Lehren fuer Europa*, in RECHT DER INTERNATIONALEN WIRTSCHAFT 1979, p. 365.
35. *Council Directive*, *supra* note 1, at art. 6(b).
36. *Commission Recommendation*, *supra* note 7, at art. 4.
37. *Council Directive*, *supra* note 1, at art. 5 & 8.
38. *Id.* at art. 7(a).
39. *Id.* at art. 7(b).
40. Schwarz, Subaghi, Peltzer & Schuecking, *supra* note 13, at 66ff.
41. Von Huelsen, *supra* note 29, at 376.

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he still does bear the ultimate burden of proof; thus, where no real evidence is available, courts must decide in favor of the consumer.

The producer is not liable when the product was not manufactured for sale or any other form of distribution for commercial purposes nor manufactured or distributed by him in the course of his business.[42] This defense creates an exemption for articles made for private use or consumption and products of hobbies.

Another possible defense is that the defect was due to the product's compliance with mandatory regulations issued by public authorities.[43] This wording could be misunderstood. It does not mean that the producer is free of liability when he observed the official safety standards—this would not suffice to exonerate the producer. Likewise, the producer would not be automatically exonerated if he complied with the norms and standards in the industry. What it means is that the producer is free of liability if the legal requirements were the *cause* of the defect. Certainly, this requirement will rarely be met, and the defense will probably not be raised very often.

A more important defense which is open to producers is the "state of the art" defense which provides that the producer shall not be liable when he proves that considering the state of scientific and technical knowledge at the time the product was put into circulation there was no way of knowing that the defect existed.[44] This "state of the art" defense, which had not been included in the Commission Recommendation,[45] was brought in as a concession, and otherwise the Directive would probably not have passed. The concern shared by some member states and European industry was that technical and scientific development would be adversely affected because costs for compensation of damages and insurance premiums would be prohibitive. Introduction of new products would be subject to excessively high risks.

The "state of the art" defense does not limit the producer's duty of care to observe and monitor his products subsequent to introduction and thus to minimize risks to the consumers. This duty is acknowledged in most European countries. For example, the German Federal Supreme Court held in the famous *Estil* case[46] that the producer was to be charged with negligence in product supervision, where prior to the plaintiff's accident the producer had a duty to recall the product from the market or

42. *Council Directive*, *supra* note 1, at art. 7(c).
43. *Id.* at art. 7(d).
44. *Id.* at art. 7(e).
45. *Cf. Commission Recommendation*, *supra* note 7, at art. 5.
46. German Federal Supreme Court Gazette 59, p. 172 (in that case, the physician injecting the anesthetic at the elbow joint inadvertently mistook an artery for a vein).

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to at least give more specific instructions and warnings concerning the dangers involved in its application. Other cases are on the same line.

According to art. 15(1)(b) of the Directive, the member states are free to provide in legislation that the exonerating "state of the art" defense will not be admitted. This option was designed to give the member states the opportunity to retain laws and regulations which provide for strict liability, such as the German Pharmaceutical Products Act.[47] Whether the member states will by way of derogation provide for additional legislation is hard to predict. It is my view that this is not very likely and that it is not advisable to expand the scope of liability.

Last but not least, the Council Directive provides a special defense to the supplier of a component.[48] The manufacturer of a component part is free of liability if he can show that the defect is not attributable to the inferior quality of his product, but rather to the design of the finished product in which the component part has been installed or to the instructions given by the producer of the finished product. Although this wording only mentions the supplier of components, it seems obvious that the defense would also be available to suppliers of raw materials. One might argue that this defense is not necessary because in this situation the supplied product is simply not defective. However, the express availability of the defense makes it clear that the injured party bears only the burden of proof that the *finished* product is defective, leaving the supplier of the component to prove that the defect was attributable to the other causes cited.

V. Extent of Recoverable Damages

Article 9 of the Council Directive provides for compensation of damages caused by death or personal injury. Whether damages to property should also be recoverable was controversial. The Council Directive now provides that if the defective product caused damage or destruction to other commercial objects, damages are not recoverable.[49] However, damages for items ordinarily intended for private use or consumption are recoverable,[50] subject to a threshold deduction of 500 European Currency Units (ECU)—about $ 480. This threshold should serve to deter excessive litigation in minor cases.

As far as damages for death or personal injury are concerned, the Council Directive—in deviation from the Commission Recommendation

47. *See supra* note 16.
48. *Council Directive*, *supra* note 1, at art. 7(f).
49. *Id.* at art. 9(b).
50. *Id.* at art. 9(b).

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which set a ceiling of twenty-five million ECU[51]—does not set a financial limit on the producer's liability. This point has been very controversial, and the German delegation had pleaded for a limitation on liability. Still, the Directive does recognize that a system of non-fault liability without an upper limit might contravene legal traditions in most member states and therefore be inappropriate. Art. 16 therefore leaves an option to the member states to deviate from the principle of unlimited liability by providing for a limit on the producer's total liability for damages resulting from death or personal injury. This limit may not be less than seventy million ECU,[52] equaling approximately $ 65 million. Considering the position the German delegation had taken during the negotiations, it is my belief that the German legislation will exercise the option and provide for a financial ceiling on producers' liability.

The Council Directive—unlike the United States legal system of product liability—does not provide for punitive damages or for compensation for pain and suffering and other non-material damages. With regard to those damages, the national provisions shall apply.[53] In the Federal Republic of Germany, liability is generally limited to compensatory damages.[54] However, in case of injury to the body or health, or in the case of deprivation of liberty, even non-pecuniary damages, i.e., damages for pain and suffering, are recoverable under section 847 of the German Civil Code.[55] Where the injury results in the death of a person, under German law the dependents have no right of their own for pain and suffering. Compared to the awards rendered by United States courts, the maximum awards and also the average awards rendered by German and other European courts are much lower.

VI. Conclusion

The Council Directive's goal is to provide for improved consumer protection by introducing the principle of non-fault liability on the part of producers, which with a few statutory exceptions has hitherto been alien to the European legal systems. The Directive also expands the scope of parties against whom a product liability claim may be asserted, thus changing the legal concept of "producers' liability" to a concept of "product

51 *Commission Recommendation*, *supra* note 7, art. 7.

52 *Council Directive*, *supra* note 1, at art. 16(1).

53 *Id.* at art. 9.

54 Schwarz, Sabaghi, Peltzer & Schuecking, *supra* note 13, at 62.

55 Section 847(1) of the German Civil Code reads: "In the case of injury to the body or health, or in the case of deprivation of liberty, the injured party may also demand fair compensation in money for non-pecuniary damages. This claim is not transferable, and does not pass to the heirs, unless it has been acknowledged by contract or an action on it has been commenced."

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